

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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LINDA MARIE OTTO,

Complainant,

vs.

J. I. CASE CO. and the UNITED AUTO  
WORKERS 700 STATE LOCAL UNION NO. 180,

Respondents.

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Case XVI  
No. 24972 Ce-1820  
Decision No. 17190-A

Appearances:

Charles Swanson, Attorney at Law, appearing on behalf of the Complainant.  
Seyfarth, Shaw, Fairweather & Geraldson, Attorneys at Law, by Sandra P. Zemm, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on August 1, 1979, alleging that the above named Respondents had committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA), and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held before the Examiner in Racine, Wisconsin, on December 14, 1979; and at the commencement of said hearing the Examiner having granted Complainant's request that the portion of the complaint directed against the United Auto Workers 700 State Local Union No. 180 be dismissed; and a transcript of said hearing having been received by the Examiner on January 10, 1980; and the parties having made oral argument at the conclusion of the hearing; the Examiner, having considered the evidence and arguments of the parties, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Linda Marie Otto, herein Complainant, was employed by J. I. Case Company from April 12, 1979 until her discharge on May 10, 1979.
2. J. I. Case Company, herein Respondent, is an employer having offices in Racine, Wisconsin. Respondent and International Union United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 180, herein the Union, are parties to a 1977-1980 collective bargaining agreement covering those employes of Respondent, including Complainant, for whom the Union is the exclusive bargaining representative. Said collective bargaining agreement contains a grievance procedure which provides for final and binding arbitration as the exclusive remedy for unresolved disputes regarding the "interpretation or application" of the agreement. The parties' contract also contains the following provision:

ARTICLE IX

SENIORITY

Section 2. Probationary Employees.

A newly hired or rehired employee shall be considered an employee on probation for a period of sixty (60) calendar days, which must be completed within twelve (12) months.

This period is intended to give the Company an opportunity to evaluate the new employee's suitability and his work performance, and his termination for reasons related to suitability and work performance is entirely within the discretion of the Company. An employee retained beyond the probationary period shall acquire seniority in the department in which he completed his probationary period, and his seniority will date back to his hiring date.

3. On May 10, 1979, Respondent discharged Complainant during her sixty day probationary period due primarily to its perception that she had a poor attitude. On May 11, 1979 the Complainant's Union steward assisted her in preparing a written grievance protesting her discharge. Shortly thereafter, pursuant to Step 1 of the contractual grievance procedure, Union representatives met with the Respondent and urged that the Complainant be reinstated. The Respondent's Step 1 answer was as follows:

Article IX, Section 2 clearly states that a new employee will be considered a probationary employee for a period of sixty (60) calendar days. Furthermore, a probationary employee's termination for reasons related to suitability and work performance is entirely within the discretion of the company. The grievant was discharged for good cause while still carrying the status of a probationary employee. Grievance denied.

The Union then pursued the Complainant's grievance directly to Step 3 of the contractual grievance procedure and again met with Respondent. Respondent's Step 3 answer was as follows:

The issue in question is not subject to the grievance procedure.

After receiving the Respondent's Step 3 answer the Union decided not to pursue the Complainant's grievance to the next "pre-arbitration" step of the contractual grievance procedure. When making this decision the Union considered the applicable contractual language, the facts which its investigation had revealed, and the Respondent's position as to Complainant's job performance, and concluded that Complainant's grievance was not likely to be sustained by an arbitrator.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

#### CONCLUSIONS OF LAW

1. When investigating and processing Complainant Linda Marie Otto's grievance and ultimately concluding not to pursue said grievance to arbitration, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 180 did not breach its duty of fair representation with respect to Complainant.

2. Since Complainant Linda Marie Otto's collective bargaining representative did not violate its duty to fairly represent her, the Examiner can not assert the Wisconsin Employment Relations Commission's jurisdiction under Section 111.06(1)(f), Stats. to determine whether Respondent J. I. Case Company violated its collective bargaining agreement with the Union when it discharged Complainant Linda Marie Otto.

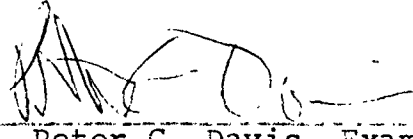
Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 15th day of February, 1980.

By



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Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent violated the bargaining agreement between Respondent and the Union when it discharged her, and that the Union violated its duty to fairly represent her when it failed to pursue her discharge grievance to arbitration. Respondent denies that Complainant's discharge violated the applicable bargaining agreement and affirmatively asserts that Complainant failed to exhaust the grievance/arbitration procedure contained therein.

In Mahnke v. W.E.R.C. 66 Wis. 2nd 524 (1975), the Wisconsin Supreme Court stated that when an employe contends that its employer breached a collective bargaining agreement and thereby violated Section 111.06(1)(f), Stats. and where said agreement contains a grievance/arbitration procedure which is the exclusive remedy for such claims of contractual breach, the employe cannot pursue the statutory claim unless it can be shown that the employe unsuccessfully attempted to exhaust the contractual grievance/arbitration procedure and that said failure to exhaust was a result of the union's failure to fairly represent the employe. The Court further indicated that a union's decision not to continue to process an employe's grievance does not constitute a breach of its duty to fairly represent the employe unless the union failed to weigh relevant factors such as the likelihood of success in arbitration when making its decision.

Applying the foregoing to the instant dispute, it is undisputed that Complainant unsuccessfully attempted to exhaust the contractual grievance/arbitration procedure with respect to her discharge. The question thus becomes one of determining whether the Union's decision not to continue to process Complainant's grievance represented a breach of its duty to fairly represent her. The record clearly establishes that when it decided not to process Complainant's grievance beyond Step 3, the Union made a good faith consideration of the applicable contractual language, the facts which its investigation had revealed, and the Respondent's position. Said consideration led the Union to conclude that the likelihood of success in arbitration was minimal. There is no convincing evidence to support Complainant's assertion that the Union's decision was based upon a feeling that it had no obligation to fairly represent Complainant because she was a probationary employe. Rather the record reveals that the Union reached a good faith conclusion that even if Complainant was a good employe, the combination of her probationary status and the content of Article IX, Section 2 doomed her grievance to arbitral defeat. In light of the foregoing, it must be concluded that the Union met its obligation under Mahnke to consider relevant factors when deciding whether to continue to process Complainant's grievance and therefore that the Union did not breach its duty to fairly represent her. Thus the Examiner cannot reach the merits of her contractual claim against the Respondent. 1/

Dated at Madison, Wisconsin this 15th day of February, 1980.

By

  
Peter G. Davis, Examiner

1/ During the December 14, 1979 hearing, the Examiner granted Respondent's motion to dismiss the complaint based upon the foregoing analysis.